Supreme Court, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

No. 94-632

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MAURICE SPORTING GOODS, INC.,
Petitioner,

v.

MAXWAY CORPORATION AND DANNERS, INC.,
by and through their OFFICIAL COMMITTEE
OF UNSECURED CREDITORS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

REBECCA S. HENDERSON
PETREE STOCKTON, L.L.P.
3500 One First Union Center
Charlotte, NC 28202-6001
(704) 338-5000

Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

17 pp

QUESTION PRESENTED

Section 546(a) of the Bankruptcy Code, prior to its recent amendment, provided that an avoidance action "may not be commenced after the earlier of - (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302 or 1202 of this title; or (2) the time the case is closed or dismissed." 11 U.S.C. §546(a) (amended 1994). The question presented is whether the two year period of §546(a)(1) is applicable to a debtor in possession, whose powers arise under §1107 of the Bankruptcy Code and who is not a trustee appointed under any of the subsections enumerated in §546(a)(1).

LIST OF PARTIES

The parties to the proceedings below were Petitioner Maurice Sporting Goods, Inc., and Respondents Maxway Corporation and Danners, Inc., by and through their Official Committee of Unsecured Creditors.

Maxway Corporation and Danners, Inc. are debtors in possession in bankruptcy cases pending in the United States Bankruptcy Court for the Western District of North Carolina. Prior to filing bankruptcy, Maxway Corporation was a North Carolina corporation, the stock of which was wholly-owned by Maxway Holdings, Inc., a privately held corporation. Prior to its bankruptcy Danners, Inc. was an Indiana corporation, the stock of which was wholly-owned by Maxway Corporation. Neither Maxway Corporation or Danners, Inc. have any subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

DECISION BELOW 1

REASONS FOR DENYING THE PETITION 2

I. THE BANKRUPTCY REFORM ACT OF 1994 SUBSTANTIVELY AMENDED §546(a) OF THE BANKRUPTCY CODE, AND THIS AMENDMENT OBVIATES THE NEED TO RESOLVE THE CONFLICT IN THE CIRCUIT COURTS OF APPEAL 2

II. A SPLIT IN THE CIRCUIT COURTS OF APPEAL OF THE INTERPRETATION OF OLD §546(a) IS TOLERABLE 6

III. THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED OLD §546(a) OF THE BANKRUPTCY CODE .. 7

CONCLUSION 9

TABLE OF AUTHORITIES

SUPREME COURT DECISIONS

Reiter v. Sonotone Corporation, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) 8

U.S. v. Menasche, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955) 9

U.S. v. Nordic Village, Inc., ___ U.S. ___, 112 S. Ct. 1011, 117 L.Ed.2d 181 (1992) 8

COURTS OF APPEAL DECISIONS

Construction Mgt. Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group, Inc.), 13 F. 3d 81 (3d Cir. 1994) 2

In re Maxway Corporation, 27 F.3d 980 (4th Cir. 1994) 2, 4, 7

In re McLean Industries, Inc., 30 F.3d 385 (2d Cir 1994) 2

U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods. Inc.), 22 F.3d 37 (2d Cir. 1994) 2

Upgrade Corp. v. Government Tech. Servs., Inc. (In re Softwaire Centre Int'l, Inc.), 994 F.2d 682 (9th Cir. 1993) 2

Zilkha v. Leighton, 920 F.2d 1520 (10th Cir. 1990) 2, 6

BANKRUPTCY COURT AND DISTRICT COURT DECISIONS

In re Afco Development Corp., 65 B.R. 781 (Bankr. D. Utah 1986) 3

In re Air One, Inc., 75 B.R. 998 (Bankr. E.D. Mo. 1987) 3

In re Alithochrome Corp., 53 B.R. 906 (Bankr. S.D.N.Y. 1985) 3

In re Allegheny International, Inc., 136 B.R. 396 (Bankr. W.D. Pa. 1991), *aff'd* 145 B.R. 823 (W.D. Pa. 1992) . 3

In re Brin-Mont Chemicals, Inc., 154 B.R. 903 (M.D.N.C. 1993) 3

In re Cardullo, 142 B.R. 138 (Bankr. E.D. Va. 1992) . 3

In re Denver/Robins Venture Partners, Ltd., 166 B.R. 769 (Bankr. M.D. Ga. 1994) 3

In re Electrical Materials Co., 160 B.R. 1018 (Bankr. W.D. Mo. 1993) 3

In re Hooker Investments, Inc., 162 B.R. 426 (Bankr. S.D.N.Y. 1993) 3

In re Hunt, 136 B.R. 437 (Bankr. N.D.Tex. 1991) . . . 3

In re J.E. Jennings, Inc., 46 B.R. 167 (Bankr. E.D. Pa. 1985) 4

In re Jet Florida System, Inc., 73 B.R. 552 (Bankr. S.D. Fla. 1987) 3

In re Korvettes, Inc., 67 B.R. 730 (S.D.N.Y. 1986) . . . 3

In re Mahoney, Trocki & Assoc., Inc., 111 B.R. 914 (Bankr. S.D. Cal. 1990) 3

In re Mars Stores, Inc., 150 B.R. 869 (Bankr. D. Mass. 1993) 3

In re Matter of Choice Vend, Inc., 49 B.R. 719 (Bankr. D. Conn. 1985) 4

In re National Steel Service Center, Inc., 170 B.R. 745 (Bankr. N.D. Ga. 1994) 3

In re One Marketing Co., Inc., 17 B.R. 738 (Bankr. S.D. Tex. 1982) 4

In re Pullman Construction Industries, Inc., 132 B.R. 359 (Bankr. N.D. Ill. 1991) 3

In re Steel, Inc., 55 B.R. 426 (Bankr. E.D. La. 1985) 4

In re Tamiami Range and Gun Shop, Inc., 130 B.R. 617 (Bankr. S.D. Fla. 1991) 3

In the Matter of Silver Mills Frozen Foods, Inc., 23 B.R. 179 (Bankr. W.D. Mich. 1982) 4

Matter of Freedom Ford, Inc., 140 B.R. 585 (Bankr. M.D. Fla. 1992) 3

STATUTES AND RULES

11 U.S.C. §546 (1994) 4, 5

11 U.S.C. §546(a)(amended 1994) 2-9

Bankruptcy Reform Act of 1994 . . . . . 2, 4, 6

OTHER AUTHORITIES

4 COLLIER BANKRUPTCY PRACTICE GUIDE ¶64.02[6] (1993) 4

4 COLLIER ON BANKRUPTCY ¶546.02[2] [15th ed. 1990) 4

No. 94-632

In The

Supreme Court of the United States

October Term, 1994

MAURICE SPORTING GOODS, INC.,

Petitioner,

v.

MAXWAY CORPORATION AND DANNERS, INC., by and through their OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Maxway Corporation and Danners, Inc., by and through their Official Committee of Unsecured Creditors, respectfully request that the Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals for the Fourth Circuit reported at 27 F.3d 980 (4th Cir. 1994).

REASONS FOR DENYING THE PETITION

I. The Bankruptcy Reform Act of 1994 substantively amended §546(a) of the Bankruptcy Code, and this amendment obviates the need to resolve the conflict in the Circuit Courts of Appeal.

The Respondents acknowledge that the decision of the Fourth Circuit Court of Appeals reported at 27 F.3d 980 (4th Cir. 1994), *In re Maxway Corporation*, conflicts with decisions of the Second, Third, Ninth and Tenth Circuit Courts of Appeal;[1] however, because of the enactment on October 22, 1994, of the Bankruptcy Reform Act of 1994 (the "1994 Reform Act"), resolution of this conflict by this Court would be merely academic.

Prior to its amendment by §216 of the 1994 Reform Act, §546(a) of the Bankruptcy Code provided as follows:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of -

---

[1] *In re McLean Industries, Inc.*, 30 F.3d 385 (2d Cir 1994); *U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods. Inc.)*, 22 F.3d 37 (2d Cir. 1994); *Construction Mgt. Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group, Inc.)*, 13 F. 3d 81 (3d Cir. 1994); *Upgrade Corp. v. Government Tech. Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993); *Zilkha v. Leighton*, 920 F.2d 1520 (10th Cir. 1990).

> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302 or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. §546(a)(amended 1994).

The great majority of bankruptcy courts, district courts, and bankruptcy practitioners have interpreted Bankruptcy Code §546(a) in accordance with its plain language and determined that in a chapter 11 case, all avoidance actions must be filed within two years after the appointment of a trustee under Bankruptcy Code §1104, or if no trustee had been appointed under §1104, by the time the case was closed or dismissed.[2] The Fourth

---

[2] *See, e.g., In re National Steel Service Center, Inc.*, 170 B.R. 745 (Bankr. N.D. Ga. 1994); *In re Denver/Robins Venture Partners, Ltd.*, 166 B.R. 769 (Bankr. M.D. Ga. 1994); *In re Hooker Investments, Inc.*, 162 B.R. 426 (Bankr. S.D.N.Y. 1993); *In re Electrical Materials Co.*, 160 B.R. 1018 (Bankr. W.D. Mo. 1993); *In re Brin-Mont Chemicals, Inc.*, 154 B.R. 903 (M.D.N.C. 1993); *In re Mars Stores, Inc.*, 150 B.R. 869 (Bankr. D. Mass. 1993); *In re Allegheny International, Inc.*, 136 B.R. 396 (Bankr. W.D. Pa. 1991), *aff'd* 145 B.R. 823 (W.D. Pa. 1992); *In re Cardullo*, 142 B.R. 138 (Bankr. E.D. Va. 1992); *Matter of Freedom Ford, Inc.*, 140 B.R. 585 (Bankr. M.D. Fla. 1992); *In re Hunt*, 136 B.R. 437 (Bankr. N.D.Tex. 1991); *In re Pullman Construction Industries, Inc.*, 132 B.R. 359 (Bankr. N.D. Ill. 1991); *In re Tamiami Range and Gun Shop, Inc.*, 130 B.R. 617 (Bankr. S.D. Fla. 1991); *In re Mahoney, Trocki & Assoc., Inc.*, 111 B.R. 914 (Bankr. S.D. Cal. 1990); *In re Air One, Inc.*, 75 B.R. 998 (Bankr. E.D. Mo. 1987); *In re Jet Florida System, Inc.*, 73 B.R. 552 (Bankr. S.D. Fla. 1987); *In re Korvettes, Inc.*, 67 B.R. 730 (S.D.N.Y. 1986); *In re Afco Development Corp.*, 65 B.R. 781 (Bankr. D. Utah 1986); *In re Alithochrome Corp.*,

(continued...)

Circuit Court of Appeals also embraced this strict construction and found that the two year statute of limitations does not begin to run until the appointment of one of the trustees specified in Bankruptcy Code §546(a)(1).[3]

The Second, Third, Ninth and Tenth Circuits, however, abandoned the traditional rules of statutory construction and found that notwithstanding the plain language of Bankruptcy Code §546(a)(1), it applies to debtors in possession, who are not trustees appointed under any of the sections enumerated in §546(a)(1), and that the time begins to run against a debtor in possession upon the filing of the bankruptcy petition.

Congress has remedied the Circuit Courts' inconsistent interpretations of §546(a)(1) in §216 of the 1994 Reform Act. As amended by the 1994 Reform Act, Bankruptcy Code §546(a) now provides the following:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this

---

[2](...continued)
53 B.R. 906 (Bankr. S.D.N.Y. 1985); *In re Matter of Choice Vend, Inc.*, 49 B.R. 719 (Bankr. D. Conn. 1985); *In re J.E. Jennings, Inc.*, 46 B.R. 167 (Bankr. E.D. Pa. 1985); *In re Steel, Inc.*, 55 B.R. 426 (Bankr. E.D. La. 1985); *In the Matter of Silver Mills Frozen Foods, Inc.*, 23 B.R. 179 (Bankr. W.D. Mich. 1982); *In re One Marketing Co.*, Inc., 17 B.R. 738 (Bankr. S.D. Tex. 1982); 4 COLLIER ON BANKRUPTCY ¶546.02[2] [15th ed. 1990); 4 COLLIER BANKRUPTCY PRACTICE GUIDE ¶64.02[6] (1993).

[3] *Maxway*, at 984.

> title may not be commenced after the earlier of -
>
> (1) the later of -
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. §546 (1994).

Through this amendment, Congress has substantively changed §546(a)(1) and definitively established an outside limit for bringing avoidance actions, applicable to all parties. Now, in a chapter 11 case, as long as the debtor remains in possession, actions must be commenced within two years. Trustees under all chapters appointed within the initial two year period are subject to this same deadline, except that the time may be extended to allow trustees at least a year after appointment to commence actions.

The amendment renders all of the Circuit Courts' interpretations of old §546(a)(1) irrelevant. This Court therefore does not need to resolve the conflict.

II. A split in the Circuit Courts of Appeal of the interpretation of old §546(a) is tolerable.

Although the 1994 Reform Act is effective upon enactment,[4] it generally does not apply to pending cases. Respondents acknowledge that there are cases, such as the Respondents' bankruptcy cases, which will be governed by the existing, and conflicting, interpretations of §546(a)(1). The number of these cases, however, is statistically insignificant, and a conflict affecting such a small number of cases, decreasing with time, is permissible.

After the Tenth Circuit Court of Appeals decision of *Zilkha v. Leighton* in 1990,[5] the first circuit court to decide that §546(a)(1) applied to debtors in possession, bankruptcy practitioners have advised debtors in possession to file avoidance actions within two years of the entry of the order for relief.[6] Practically speaking then, the conflict in the Circuit Courts of Appeal affects only that number of chapter 11 cases which were filed more than two years before the December 1990 *Zilkha* decision and in which the debtors are still in possession.

---

[4] Bankruptcy Reform Act of 1994, §702.

[5] 920 F.2d 1520 (10th Cir. 1990).

[6] The Respondents' bankruptcy cases had been pending more than two years when *Zilkha* was decided.

The Administrative Office of the United States Courts reports that of the 1,156,310 bankruptcy cases pending as of December 31, 1993, only two percent (2%) are chapter 11 cases filed before January 1, 1990.[7] Given the statistically small number of cases affected by this issue, the conflict is tolerable.

III. The Fourth Circuit Court of Appeals correctly interpreted old §546(a) of the Bankruptcy Code.

The Fourth Circuit Court of Appeals' interpretation of old §546(a)(1) follows the traditional rules of statutory construction, is correct, and should not be disturbed. The Fourth Circuit stated that "courts should venture beyond the plain meaning of the statute only in those rare instances in which there is a clearly expressed legislative intent to the contrary, in which a literal application of the statute would thwart its obvious purpose, or in which a literal application of the statute would produce an absurd result."[8] Since none of those circumstances are present in this case, the Fourth Circuit found that §546(a)(1) is not applicable to a debtor in possession.

In its petition to this Court for a writ of certiorari, Petitioner strains to argue ambiguity in §546(a)(1) by

---

[7] Chapter 11 debtors in possession in cases filed after January 1, 1990, will have had at least one full year after the *Zilkha* decision within which to bring avoidance actions.

[8] *Maxway*, at 982-83 (citations omitted).

focusing on the use of the word *appointment.* Petitioner artfully encourages an expansive definition of *appointment* to include any designation of a permanent representative of the estate, including a debtor in possession that assumes duties under Bankruptcy Code §§1101(1) and 1107(a). Petitioner's argument fails, however, because it ignores the words that modify and limit the term *appointment.* It is not merely the appointment of a trustee or its equivalent, but the appointment of a trustee *under section 702, 1104, 1163, 1302 or 1202*. Section 1107, the section through which a debtor in possession derives its rights, powers and duties, is not included in that list. Had Congress concluded §546(a)(1) with the phrase "and not a debtor in possession under section 1107", Congressional intent may have been slightly more apparent, but the omission of that phrase does not make the statute ambiguous.

Moreover, §546(a)(1) is the only Bankruptcy Code section empowering or limiting a trustee which also specifically identifies the Bankruptcy Code sections under which the trustee appointment is made.[9] If §546(a)(1) applies to debtors in possession, the phrase "under section 702, 1104, 1163, 1302 or 1202" would be inoperative and wholly superfluous.[10] Modification of the word *trustee*

---

[9] There are at least seventeen other places in the Bankruptcy Code where a trustee is empowered or limited.

[10] *See U.S. v. Nordic Village, Inc.*, ___ U.S. ___, 112 S. Ct. 1011, 117 L.Ed.2d 181 (1992)(a statute must, if possible, be construed in such fashion that every word has some operative effect); *See also Reiter v.*

(continued...)

with the specific appointment provisions was not an accident, and the only way to give those words any effect is to determine that Congress used them in order to exclude debtors in possession from the two year bar.

The Fourth Circuit reached the correct result in its interpretation of §546(a)(1), and the soundness of its decision argues against review by this Court.

Conclusion

For the reasons set forth herein, Respondents request that the petition for writ of certiorari be denied.

This the 4th day of November, 1994.

Respectfully submitted,

REBECCA S. HENDERSON
PETREE STOCKTON, L.L.P.
3500 One First Union Center
Charlotte, North Carolina
28202-6001
Telephone: (704) 338-5000
Telecopy: (704) 338-5125
Counsel for Respondents

---

[10](...continued)
Sonotone Corporation, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979); *U.S. v. Menasche*, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955).